



March 10, 2003

ASVET MEMORANDUM NO. 02-03

MEMORANDUM FOR: REGIONAL ADMINISTRATORS AND DIRECTORS
FOR VETERANS' EMPLOYMENT AND TRAINING

FROM: FREDERICO JUARBE JR. 

SUBJECT: Guidance on USERRA Complaints Where the Employer
Refuses to Allow Claimant to Return to Work Following
Smallpox Vaccination

PURPOSE: To advise field staff of VETS policy with respect to USERRA entitlements of National Guard and Reserve members who seek to return to work after receiving a smallpox vaccination that was required as part of their military service.

BACKGROUND: VETS has become aware that in some cases an employer has told an employee who received a smallpox vaccination (while performing National Guard or Reserve drills or while on active duty) that the employee could not return to work for periods up to three weeks because of the employer's concerns about spread of what is referred to as vaccinia among other employees or customers. The employer has forced the employee to choose between using annual leave/vacation, sick leave, or unpaid leave while awaiting the employer's permission to return to work. Concerns about the dangers associated with an immediate return to work following vaccination appear to be most common among employers in health care where the employees involved are in contact with patients.

Both the Department of Defense and the Federal Centers for Disease Control (CDC) have taken the position that the risk of transmission of vaccinia by a person who has received a smallpox vaccination is extremely low if certain simple precautions are taken by the person who has been vaccinated. A relevant excerpt from CDC guidance on this issue is attached. Further information on smallpox vaccinations and contact information are available on the CDC Web site at www.bt.cdc.gov/agent/smallpox/vaccination.

POLICY: It is VETS policy that persons who receive a smallpox vaccination while performing service in the uniformed services have full reemployment rights under USERRA. Since most persons receive these vaccinations while performing National Guard or Reserve drills or other types of duty of less than 31 days, their entitlement is to report to work in accordance with section 4312(e)(1)(A) of USERRA (38 U.S.C. § 4312(e)(1)(A)). This section generally requires reemployment the next day after completion of the service.

ACTION: A VETS staff member who receives a complaint from a person whose employer has refused to allow him or her to return to work because of concerns related to transmission of vaccinia as described above, should open a USERRA case using normal procedures. In the opening letter, describe the VETS policy on this issue and provide a copy of this ASVET Memorandum. The following options should be presented to the employer:

1. The employer should allow the person to return to work as required by section 4312(e)(1)(A). You should provide a copy of the CDC guidance and Web site link to the employer, and advise the employer to contact the CDC if the employer has any questions regarding the CDC guidance.
2. If the employer does not allow the person to return to his or her position of employment due to the employer's concerns about vaccinia transmission, the employer is in effect treating the service member as having a disability incurred in service. Section 4313(a)(3) of USERRA requires that an employer make reasonable efforts to accommodate a disability incurred in service, and if such accommodation is not possible the employer must place the person in an alternate position that is equivalent in seniority, status, and rate of pay until the disability has passed. If such a position does not exist, placement should be in the nearest approximation of such position. Although the CDC guidance indicates that reasonable accommodations can be made to allow a recently-vaccinated person to return to his or her regular position of employment, an employer who does not agree with the CDC guidance would still be required to employ the person in accordance with 4313(a)(3). You should advise the employer of the requirements of section 4313(a)(3).
3. If the employer does not allow the person to return to the workplace in any position, you should advise the employer to reemploy the person and place him or her on an administrative paid leave of absence with full benefits until the employer allows the person to return to active work. However, the employer cannot require the person to use his or her annual, sick or other similar leave or vacation during the period of this administrative paid leave of absence.

Advise the Chief, Investigations and Compliance Division through channels of any cases opened that involve this issue.

ADDITIONAL INFORMATION: For additional information, contact Nick Dawson at (202) 693-4711 or dawson-charles@dol.gov.

Attachment: CDC guidance

From CDC site

What is the risk of spreading vaccinia to co-workers?

The risk of spreading vaccinia to co-workers in a healthcare setting is extremely low if proper hand hygiene and site care instructions are followed. Vaccinia is spread by touching vaccine, a vaccination site, or by touching bandages or clothing that have become contaminated with live virus and then touching yourself or another person. In order to reduce the risk of contact spread of vaccinia, site care instructions mandate that the vaccine site remain covered with a gauze bandage and that healthcare workers involved in direct patient care cover the gauze with a semipermeable dressing as an additional barrier to vaccinia spread. In addition, careful hand hygiene is necessary to minimize the risk of contact spread of vaccinia. Hands should be washed after having direct contact with vaccine, the vaccination site, or anything that might be contaminated with live virus (bandages, bedding, etc...) Wash hands with soap and water or use alcohol-based hand rubs, such as gels or foams. If hands are visibly contaminated with fluids, then washing with soap and water is required.

In the past, most cases of contact spread of vaccinia occurred in the vaccinees themselves. Spread to other individuals almost always occurred with the type of close physical contact that occurs in the household or in similar situations where careful hand hygiene and site care may not be followed. In the past, spread of vaccinia virus to contacts was reported to occur between 20 and 60 times in 1 million people vaccinated. (added Jan 10, 2003)

Do healthcare workers who have been vaccinated need to wear masks when working with immunocompromised patients?

No. Vaccinia, the live virus in the smallpox vaccine, is spread by touch. Vaccinia has not been shown to spread through airborne contagion. (added Dec 20, 2002)